

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	)	
	)	File No. EB-06-SE-417
Data Capture Solutions, Inc.	)	NAL/Acct. No. 200832100073
	)	FRN 0018049874

**NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ADMONISHMENT**

**Adopted: August 21, 2008****Released: August 25, 2008**

By the Chief, Spectrum Enforcement Division, Enforcement Bureau:

**I. INTRODUCTION**

1. In this *Notice of Apparent Liability for Forfeiture* (“NAL”), we find Data Capture Solutions, Inc. (“DCS”) apparently liable for a forfeiture in the amount of four thousand dollars (\$4,000) for willful and repeated violation of Section 302(b) of the Communications Act of 1934, as amended (“Act”),<sup>1</sup> and Section 2.803(a) of the Commission’s Rules (“Rules”).<sup>2</sup> The noted apparent violations involve DCS’s marketing of noncompliant portable data terminals (“PDTs”).<sup>3</sup>

**II. BACKGROUND**

2. The Enforcement Bureau’s Spectrum Enforcement Division (“Division”) received a complaint alleging that DCS had modified a PDT manufactured by Symbol Technologies, Inc. (“Symbol”) by replacing the two megabytes per second (“mbps”) radio assembly with an 11 mbps radio assembly without authorization from Symbol. The complaint also asserted that DCS affixed new labeling to the modified PDT that did not include the device’s FCC Identifier (“FCC ID”).

3. The PDTs involved in this matter are equipped with internal radio assemblies which transmit the data collected by the PDTs. The internal radio assemblies discussed below are designated by Symbol as the LA3021, which has a data transmission rate of two mbps, and the LA4121, which has a data transmission rate of 11 mbps. Symbol holds grants of equipment certification for both of these radio assemblies.<sup>4</sup>

4. After its receipt of the complaint, the Division began an investigation. In pursuance of the investigation, the Division, on March 7, 2007, directed a letter of inquiry (“LOI”) to DCS.<sup>5</sup> DCS responded on April 18, 2007.<sup>6</sup> After follow-up e-mail messages from Division staff on May 3 and

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<sup>1</sup> 47 U.S.C. § 302a(b).

<sup>2</sup> 47 C.F.R. § 2.803(a).

<sup>3</sup> PDTs are radio frequency devices that collect data. They are primarily used to take inventory.

<sup>4</sup> FCC ID H9PLA3021 and FCC ID H9PLA4121, respectively.

<sup>5</sup> See Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission to Data Capture Solutions, Inc. (March 7, 2007).

<sup>6</sup> See Letter from Ian A. Volner and Ronald E. Quirk, Jr., Counsel for Data Capture Solutions, Inc., to Thomas D. Fitz-Gibbon, Esq., Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission (April 18, 2007) (“First LOI Response”).

November 8, 2007, DCS filed further responses to the LOI on May 22<sup>7</sup> and December 6, 2007.<sup>8</sup> On February 1, 2008, the Division directed a second LOI to DCS.<sup>9</sup> DCS responded to the second LOI on March 10, 2008.<sup>10</sup> After a follow-up e-mail message from Division staff on April 15, 2008, DCS filed a further response to the second LOI on May 8, 2008.<sup>11</sup>

5. DCS requested confidentiality of its LOI responses and that request remains pending. Accordingly, DCS's LOI responses are discussed in an Appendix hereto, and we are treating the Appendix as confidential at this time.

### III. DISCUSSION

#### A. DCS Apparently Marketed Improperly Labeled Devices

6. Section 302(b) of the Act provides that “[n]o person shall manufacture, import, sell, offer for sale, or ship devices or home electronic equipment and systems, or use devices, which fail to comply with regulations promulgated pursuant to this section.” Section 2.803(a)(1) of the Commission’s implementing regulations provides in pertinent part that:

Except as provided elsewhere in this section, no person shall sell or lease, or offer for sale or lease (including advertising for sale or lease), or import, ship, or distribute for the purpose of selling or leasing or offering for sale or lease, any radiofrequency device<sup>12</sup> unless ... [i]n the case of a device [that is] subject to certification, such device has been authorized by the Commission in accordance with the rules in this chapter and is properly identified and labeled as required by § 2.925 and other relevant sections in this chapter....

Section 2.909(a) of the Rules<sup>13</sup> provides in pertinent part:

If the radio frequency equipment is modified by any party other than the grantee and that party is not working under the authorization of the grantee pursuant to Sec. 2.929(b), the party performing the modification is responsible for compliance of the product with the applicable administrative and technical provisions in this chapter.

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<sup>7</sup> See Letter from Ian A. Volner and Ronald E. Quirk, Jr., Counsel for Data Capture Solutions, Inc., to Thomas D. Fitz-Gibbon, Esq., Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission (May 22, 2007) (“Second LOI Response”).

<sup>8</sup> See Letter from Ian A. Volner and Ronald E. Quirk, Jr., Counsel for Data Capture Solutions, Inc., to Thomas D. Fitz-Gibbon, Esq., Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission (December 6, 2007) (“Third LOI Response”).

<sup>9</sup> See Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission to Ian A. Volner and Ronald E. Quirk, Jr., Counsel for Data Capture Solutions, Inc. (February 1, 2008).

<sup>10</sup> See Letter from Ian A. Volner, Esq., and Ronald E. Quirk, Jr., Esq., Counsel for Data Capture Solutions, Inc., to Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission (March 10, 2008) (“Fourth LOI Response”).

<sup>11</sup> See Letter from Ian A. Volner and Ronald E. Quirk, Jr., Counsel for Data Capture Solutions, Inc., to Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission (May 8, 2008) (“Fifth LOI Response”).

<sup>12</sup> 47 C.F.R. § 2.801 defines a radiofrequency device as “any device which in its operation is capable of emitting radiofrequency energy by radiation, conduction, or other means.”

<sup>13</sup> 47 C.F.R. § 2.909(a).

As discussed in the confidential Appendix, we find that, under Section 2.909(a) of the Rules, DCS became the party responsible for the compliance of the modified PDTs with the applicable technical and administrative provisions, including the labeling requirements.<sup>14</sup>

7. Section 2.909(d) of the Rules provides:

If, because of modifications performed subsequent to authorization, a new party becomes responsible for ensuring that a product complies with the technical standards and the new party does not obtain a new equipment authorization, the equipment shall be labeled, following the specifications in §2.925(d), with the following: ‘This product has been modified by [insert name, address and telephone number of the party performing the modifications].’

Based on our review of DCS's LOI responses, as discussed in the confidential Appendix, we find that DCS did not label the modified PDTs as specified by Section 2.909(d).<sup>15</sup>

8. Section 2.925(a)(1) of the Rules<sup>16</sup> provides:

Each equipment covered in an application for equipment authorization shall bear a nameplate or label listing the following: (1) FCC Identifier consisting of the two elements in the exact order specified in §2.926. The FCC Identifier shall be preceded by the term *FCC ID* in capital letters on a single line, and shall be of a type size large enough to be legible without the aid of magnification.

As discussed in the confidential appendix, we find that the labels of the PDTs modified by DCS do not include the correct FCC ID numbers and, therefore, are not labeled as specified by Section 2.925(a)(1) of the Rules.

9. Section 15.19(a) of the Rules<sup>17</sup> provides in pertinent part:

In addition to the requirements in part 2 of this chapter, a device subject to certification, or verification shall be labeled as follows: ...

(3) All other devices shall bear the following statement in a conspicuous location on the device:

This device complies with part 15 of the FCC Rules. Operation is subject to the following two conditions: (1) This device may not cause harmful interference, and (2) this device must accept any interference received, including interference that may cause undesired operation.

As discussed in the confidential Appendix, we find that the labels of PDTs modified by DCS do not include the labeling required by Section 15.19(a)(3).

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<sup>14</sup> See *Ryzex, Inc.*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 878, 881 (Enf. Bur., Spectrum Enf. Div. 2008) ("*Ryzex*"), *response pending*; *DBK Concepts, Inc.*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 2870, 2873 (Enf. Bur., Spectrum Enf. Div. 2008) ("*DBK*"), *response pending*.

<sup>15</sup> See *Ryzex*, 23 FCC Rcd at 882; *DBK Concepts* 23 FCC Rcd at 2873.

<sup>16</sup> 47 C.F.R. § 2.925(a)(1).

<sup>17</sup> 47 C.F.R. § 15.19(a).

10. We, accordingly, find that DCS apparently marketed<sup>18</sup> noncompliant radio frequency devices, in willful<sup>19</sup> and repeated<sup>20</sup> violation of Section 302(b) of the Act and Section 2.803(a) of the Rules.<sup>21</sup>

### B. Proposed Forfeiture

11. Section 503(b) of the Act<sup>22</sup> authorizes the Commission to assess a forfeiture for each willful or repeated violation of the Act or of any rule, regulation, or order issued by the Commission under the Act. In exercising such authority, we are required to take into account “the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”<sup>23</sup>

12. Section 503(b)(6) of the Act<sup>24</sup> bars the Commission from proposing a forfeiture for violations that occurred more than a year prior to the issuance of an *NAL*. Section 503(b)(6) does not, however, bar the Commission from assessing whether DCS’s conduct prior to that time period apparently violated the provisions of the Act and Rules and from considering such conduct in determining the appropriate forfeiture amount for violations that occurred within the one-year statutory period.<sup>25</sup> Thus, while we may consider the fact that DCS’s conduct has continued over a period that began during 2005 or earlier, the forfeiture amount we propose herein relates only to DCS’s apparent violations that have occurred within the past year.

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<sup>18</sup> Marketing, as defined in 47 C.F.R. § 2.803(e)(4), “includes sale or lease, or offering for sale or lease, including advertising for sale or lease, or importation, shipment, or distribution for the purpose of selling or leasing or offering for sale or lease.”

<sup>19</sup> Section 312(f)(1) of the Act, 47 U.S.C. § 312(f)(1), which applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that “[t]he term ‘willful’, ... means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act ....” See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387 (1991).

<sup>20</sup> Section 312(f)(2) of the Act provides that “[t]he term ‘repeated’, ... means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.” 47 U.S.C. § 312(f)(2). See, e.g., *Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362 ¶ 10 (2001) (“*Callais Cablevision*”) (issuing a Notice of Apparent Liability for, *inter alia*, a cable television operator’s repeated signal leakage).

<sup>21</sup> See *Revision of Part 2 of the Commission’s Rules Relating to the Marketing and Authorization of Radio Frequency Devices*, Report and Order, 12 FCC Rcd 4533, 4552 (1997) (stating that the marketing of modified equipment by a party who fails to perform the steps required by Section 2.909(d) would violate the marketing rules). See also *Ryzex*, 23 FCC Rcd at 883; *DBK*, 23 FCC Rcd at 2874.

<sup>22</sup> 47 U.S.C. § 503(b).

<sup>23</sup> 47 U.S.C. § 503(b)(2)(E).

<sup>24</sup> 47 U.S.C. § 503(b)(6).

<sup>25</sup> See 47 U.S.C. § 503(b)(2)(D), 47 C.F.R. § 1.80(b)(4); see also *Behringer USA, Inc.*, Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 1820, 1825 (2006), *forfeiture ordered*, Forfeiture Order, 22 FCC Rcd. 1051 (2007); *Globcom, Inc. d/b/a Globcom Global Communications*, Notice of Apparent Liability for Forfeiture, 18 FCC Rcd 19893, 19903 (2003), *forfeiture ordered*, Forfeiture Order, 21 FCC Rcd 4710 (2006); *Roadrunner Transportation, Inc.*, Forfeiture Order, 15 FCC Rcd 9669, 9671-71 (2000); *Cate Communications Corp.*, Memorandum Opinion and Order, 60 RR 2d 1386, 1388 (1986); *Eastern Broadcasting Corp.*, Memorandum Opinion and Order, 10 FCC 2d 37 (1967), *recon. den.*, 11 FCC 2d 193 (1967); *Bureau D’Electronique Appliquee, Inc.*, Notice of Apparent Liability for Forfeiture, 20 FCC Rcd 3445, 3447-48 (Enf. Bur., Spectrum Enf. Div. 2005), *forfeiture ordered*, Forfeiture Order, 20 FCC Rcd 17893 (Enf. Bur., Spectrum Enf. Div. 2005).

13. Under the *Forfeiture Policy Statement*<sup>26</sup> and Section 1.80 of the Rules,<sup>27</sup> the base forfeiture amount for the marketing of unauthorized equipment is \$7,000 per model. As set forth in the confidential Appendix, DCS apparently marketed PDTs that were not labeled in accordance with Sections 2.909(d) and 15.19(a)(3) of the Rules. Although it is clear from the record that DCS has marketed such PDTs within the applicable one-year statute of limitations, it is not clear how many different models of such PDTs were marketed within the one-year period. Accordingly, under the specific circumstances of this case, we will not calculate the forfeiture amount based on the number of models. Thus, we find that DCS is apparently liable for a \$7,000 forfeiture for marketing PDTs that were not properly labeled in willful and repeated violation of Section 302(a) of the Act and Section 2.803(a) of the Rules. We note that the \$7,000 base forfeiture amount is typically imposed for marketing devices that are not in compliance with applicable technical requirements or are not authorized by an equipment authorization. Because marketing an improperly labeled device is not as significant a violation as marketing an unauthorized or technically non-compliant device, we find that a downward adjustment of the base forfeiture amount from \$7,000 to \$4,000 is warranted.<sup>28</sup>

14. As set forth in the confidential Appendix, DCS also apparently marketed modified PDTs that were not labeled in accordance with Section 2.925(a)(1) of the Rules (requiring a label containing the FCC ID). Because these PDTs were marketed outside the one-year statute of limitations,<sup>29</sup> the forfeiture proposed above does not include these apparent violations. Nevertheless, we admonish DCS for marketing PDTs that were not labeled in accordance with Section 2.925(a)(1) of the Rules, in violation of Section 302(a) of the Act and Section 2.803(a) of the Rules.

#### IV. ORDERING CLAUSES

15. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act, and Sections 0.111, 0.311 and 1.80 of the Rules,<sup>30</sup> DCS, **IS NOTIFIED** of its **APPARENT LIABILITY FOR A FORFEITURE** in the amount of four thousand dollars (\$4,000) for marketing PDTs that were not labeled in accordance with Sections 2.909(d) and 15.19(a)(3) of the Rules, in willful and repeated violation of Section 302(a) of the Act and Section 2.803(a) of the Rules.

16. **IT IS FURTHER ORDERED** that DCS **IS ADMONISHED** for marketing PDTs that were not labeled in accordance with Section 2.925(a)(1) of the Rules, in violation of Section 302(a) of the Act and Section 2.803(a) of the Rules.

17. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Rules, within thirty days of the release date of this Notice of Apparent Liability for Forfeiture, DCS **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

18. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Account Number and FRN Number referenced above. Payment by check or money order may be mailed to

<sup>26</sup> *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, 17113 (1997) ("*Forfeiture Policy Statement*"), recon. denied, 15 FCC Rcd 303 (1999).

<sup>27</sup> 47 C.F.R. § 1.80.

<sup>28</sup> See *Ryzex*, 23 FCC Rcd at 884; *DBK*, 23 FCC Rcd at 2875.

<sup>29</sup> See 47 U.S.C. § 503(b)(6); 47 C.F.R. § 1.80(c)(3).

<sup>30</sup> 47 C.F.R. § 0.111, 0.311 and 1.80.

Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters “FORF” in block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: [ARINQUIRIES@fcc.gov](mailto:ARINQUIRIES@fcc.gov) with any questions regarding payment procedures. DCS will also send electronic notification on the date said payment is made to [Thomas.Fitz-Gibbon@fcc.gov](mailto:Thomas.Fitz-Gibbon@fcc.gov).

19. The response, if any, must be mailed to the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, ATTN: Enforcement Bureau – Spectrum Enforcement Division, and must include the NAL/Acct. No. referenced in the caption.

20. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices; or (3) some other reliable and objective documentation that accurately reflects the petitioner’s current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

21. Requests for payment of the full amount of the NAL under an installment plan should be sent to: Associate Managing Director – Financial Operations, 445 12<sup>th</sup> Street, S.W., Room 1-A625, Washington, D.C. 20554.<sup>31</sup>

22. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by first class mail and certified mail return receipt requested to Data Capture Solutions, Inc., 151 Sheldon Road, P.O. Box 1510, Manchester, CT 06042, and to its attorneys, Ian D. Volner and Ronald E. Quirk, Jr., Venable LLP, 575 7<sup>th</sup> Street, NW, Washington, DC 20004-1601.

FEDERAL COMMUNICATIONS COMMISSION

Kathryn S. Berthot  
Chief, Spectrum Enforcement Division  
Enforcement Bureau

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<sup>31</sup> See 47 C.F.R. § 1.1914.